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Second report on unilateral acts of States

By Victor Rodríguez Cedeño, Special Rapporteur

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Introduction

1. The topic of international unilateral legal acts of States was taken up at the fiftieth session of the International Law Commission, which at the time had before it the first report of the Special Rapporteur.[1] After differentiating acts that could be regarded as autonomous or independent — hence subject to the elaboration of specific rules governing their operation — from acts that should be excluded from the scope of the study, the report set out the constituent elements of a definition of unilateral legal acts of States which produce international effects.

2. On the basis of the first report of the Special Rapporteur, the report of the Working Group established by the Commission[2] and the comments made by representatives of States in the Sixth Committee of the General Assembly at its fifty-third session, held in 1998, the Commission arrived at the conclusion that the Special Rapporteur should submit a second report. That report would contain draft articles on the scope of the draft articles and on the definition (use of terms) and conditions of validity of the unilateral acts (declarations) of States, including, *inter alia*, the question concerning the organs competent to commit the State unilaterally on an international plane and the question concerning possible grounds of invalidity concerning the expression of the will of the State.[3]

3. Before presenting the texts in question with their respective commentaries, we should make some specific points concerning certain questions raised by Governments in the Sixth Committee in 1998 in commenting on the report of the Commission on this topic, namely: the relationship between the unilateral acts that are the subject of this study and the international responsibility of States; unilateral acts and estoppel; and unilateral acts relating to international organizations, particularly State acts addressed to such organizations.

4. In the first report we stated that while acts relating to the international responsibility of States were not without interest, they should also be excluded from the scope of the study to be undertaken. It was actually stated at the time that "acts contrary to international law and acts which, although in conformity with international law, may engage the international responsibility of a State" should be excluded, since the Commission was already dealing with those topics separately.[4] Some representatives in the Sixth Committee also suggested in 1998 that acts of that nature should be excluded from the scope of the study for the same reason, namely, that the Commission was considering the topic separately.

5. Other delegations, on the other hand, stated on the same occasion that acts relating to international responsibility should not be excluded from the study undertaken by the Commission. The representative of France indicated that he did not agree with the Special Rapporteur's proposal to exclude acts which gave rise to State responsibility: "... the question of whether, and to what extent, a unilateral act might entail State responsibility was of great interest; [and] fell logically within the scope of the Commission's study."[5]

6. There is unquestionably a certain relationship between the unilateral acts by which States engage their international responsibility and the unilateral acts that are the subject of the present study; they cannot, a priori, be separated clearly and distinctly. Rather, the proposal not to refer expressly to responsibility related to methodology, since the

[1] First report on unilateral acts of States (A/CN.4/486).

[2] A/CN.4/L.558; see also *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), paras. 192–200.

[3] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), para. 200.

[4] A/CN.4/486, para. 47.

[5] Statement by the representative of France, A/C.6/53/SR.16, para. 53.

Commission considers the topic of responsibility on the basis of a report presented by the Special Rapporteur on the topic. That report examines internationally wrongful acts of States as acts giving rise to their international responsibility.

7. The question that arises is whether the unilateral acts by which States engage their international responsibility are strictly unilateral acts, which therefore fall within the scope of consideration of this specific category of acts, or, on the other hand, whether they fall within the realm of treaty relations.

8. It is a valid assertion that the acts of States which give rise to their international responsibility are unilateral legal acts in terms of form, be they of individual or collective origin. The acts that are of interest to the Commission in the present study, however, are legal acts which, in addition to being unilateral in form, are autonomous or strictly unilateral — in other words, not linked to a pre-existing norm, be it of treaty or customary origin. Acts relating to international responsibility do not by definition appear to be autonomous.

9. It seems difficult to conceive of an act which gives rise to the international responsibility of a State without being linked to the violation of a pre-existing norm, particularly the primary norm which the act in question is alleged to violate.

10. Whatever the case, the question of the relationship between internationally wrongful acts and unilateral acts of States is complex and should not be debated until further progress has been made on the topic of the international responsibility of States, which is being studied by the Commission. In the final analysis, two different regimes are involved, one relating to the international responsibility of States and the other to autonomous unilateral acts.

11. A second question that was referred to when the topic was considered in the Sixth Committee in 1998 was that of estoppel. Some representatives insisted that acts relating to estoppel should be examined in this study.

12. The first report submitted on the topic concluded that "there is a clear difference between declarations which may found an estoppel [in a trial] and declarations of a strictly unilateral nature".[6]

13. It is true that there is a certain relationship between strictly unilateral acts and estoppel, which is basically procedural. As indicated in the previous report, the nature of the primary obligations of a State, which oblige it to maintain a specific pattern of conduct, is not based, as in the case of a promise, on the actual declaration of intent by the State which formulates it, but on the secondary actions of a third State and on the detrimental consequences which would flow for that State from any change of attitude on the part of the declarant State, which generated an expectation in that other, third State.[7] Accordingly, there is a clear difference between declarations which may found an estoppel in a trial and declarations of a strictly unilateral nature, which have very specific characteristics.

14. It must be emphasized that a State formulates a unilateral legal act with the express intention of creating a new legal relationship, including, as has been indicated, obligations for that State. Such obligations are autonomous when they produce effects irrespective of their acceptance by the addressee State or of any subsequent attitude or conduct which may signify such acceptance. In estoppel, as the prevailing doctrine rightly points out, there is

[6] A/CN.4/486, para. 131.

[7] Ibid.

no creation of rights or obligations; rather, it becomes impossible to avail oneself of already existing rights and obligations in the context of a given proceeding.[8]

15. A third question that has arisen in the debate on the topic concerns acts relating to international organizations. This question should be considered from two different points of view: first, in the context of the formulation of the act, and, secondly, in the context of its legal effects in relation to other subjects of international law.

16. It is clear that the study undertaken by the Commission has as its subject unilateral legal acts of States which produce international effects, that is, legal acts formulated by States. A large number of representatives in the Sixth Committee in 1998 suggested that acts of international organizations should be excluded from the scope of the study, although it was noted that such acts could be genuine unilateral legal acts. It was emphasized that such acts were very specific and therefore required special rules, so that they fell outside the mandate of the Commission.[9]

17. In accordance with the debate on the topic in the Commission and the Sixth Committee, the present second report presents several draft articles together with their commentaries, concerning, *inter alia*:

(a) Scope of the draft articles;

(b) Definition of unilateral legal acts (declarations) of States;

(c) Capacity to formulate unilateral acts;

(d) Representatives of a State who can engage the State by formulating unilateral acts;

(e) Subsequent confirmation of acts formulated without authorization;

(f) Expression of consent;

(g) Formulation of reservations and conditional unilateral acts.

I. Scope of the draft articles

A. Draft article

18. The Special Rapporteur proposes the following article:

"**Article 1**

"Scope of the present draft articles

"The present draft articles apply to unilateral legal acts formulated by States which have international effects."

[8] P. Cahier, "Le Comportement des Etats comme source de droit et d'obligations", in *Recueil d'études de droit international en hommage à Paul Guggenheim* (Genève, IHEI, 1968).

[9] Statements by the representatives of Italy (A/C.6/53/SR.18, para. 31); Bahrain (A/C.6/53/SR.21, para. 14); Switzerland (A/C.6/53/SR.17, para. 38); Germany (A/C.6/53/SR.18, para. 21); and the United States of America (A/C.6/53/SR.14, para. 48).

B. Commentary

19. Article 1 of the draft articles on unilateral acts should follow to a large extent the methodology of the Vienna Convention on the Law of Treaties of 1969, in which article 1 states expressly that the Convention applies only to treaties between States, thus excluding agreements other than treaties and treaties in which other subjects of international law, specifically, international organizations, participate.

20. The present article 1 should stipulate that the draft articles apply to unilateral legal acts (declarations) formulated by a State, thus excluding other subjects of international law, including international organizations.

21. The term "unilateral acts of States" should be clarified in article 2, as we shall see below, following, here too, the structure of the 1969 Convention, in which the term "treaty" is clarified in article 2 relating to the use of terms in the Convention.

22. The draft articles apply to unilateral acts formulated by States, whether individually or collectively, which have international legal effects. They thus exclude acts of a political character and acts which, while also unilateral and legal, do not produce international effects.

23. As noted in the first report and in the debate on this topic in the Commission, distinguishing political acts from legal acts is a truly complex matter. While abundant State practice exists, it has not been studied systematically, which creates certain difficulties.[10]

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[10] State practice is very important in relation to the formulation of such unilateral acts or declarations, which still present difficulties in terms of their interpretation and identification. A case in point would be unilateral declarations made by nuclear-weapon States aimed at providing certain guarantees of security to non-nuclear-weapon States.

> Can such arrangements — whose content, furthermore, varies and is subject to certain conditions in most cases — positively constitute unilateral legal declarations or acts in the sense with which the Commission is concerned, or are they simply political declarations or acts which engage their authors on that level?
>
> Some of these declarations were made publicly outside the framework of international bodies and others in the framework of the Conference on Disarmament. This would appear to be the case with regard to the similar declarations made by the Chinese Government, the Minister for Foreign Affairs of the Russian Federation and the Secretary of State of the United States of America on 5 April 1995, and the declarations made by the Permanent Representative of France and the Permanent Representative of the United Kingdom in the Conference on Disarmament on 6 April 1995, by which they undertook not to use nuclear weapons against non-nuclear-weapon States parties to the Treaty on the Non-Proliferation of Nuclear Weapons, with a number of conditions limiting the scope of the declarations.
>
> In his statement, the United States representative to the Conference on Disarmament, reiterating a statement made by the President of the United States, declared that "[t]he United States reaffirms that it will not use nuclear weapons against non-nuclear-weapon States parties to the Treaty on the Non-Proliferation of Nuclear Weapons" except in the case of "an invasion or any other attack on the United States, its territories, its armed forces or other troops, its allies, or on a State towards which it has a security commitment, carried out or sustained by such a non-nuclear-weapon State in association or alliance with a nuclear-weapon State."
>
> While the nuclear-weapon States considered such acts as binding, credible and reliable, the non-aligned countries belonging to the Group of 21 at the Conference considered that such acts or declarations did not engage the countries making them and therefore did not have a legal character. In this respect, the representative of Indonesia, speaking on behalf of the Group of Non-Aligned Countries, stated on 11 April 1995 in New York that such acts did not satisfy the long-standing demands of the non-aligned countries, it being understood, as the representative of the Islamic Republic of Iran indicated on that same date, that such guarantees must take the form

In order for an international judge to be able to determine the nature of such acts, it is fundamental to determine the intention of the State formulating them.

24. Jurisprudence has been clear-cut with regard to classifying such acts as legal or political. Thus, as the International Court of Justice stated in its well-known judgments in the *Nuclear Tests* cases, for example, the unilateral declarations made by representatives of the French State were unilateral acts of a legal nature. In the case of the territorial dispute between Burkina Faso and Mali, however, the Court ruled out the possibility that the statement made by the President of Mali on 11 April 1985 might be a legal act.

25. In the first case, the Court recognized that declarations

> "made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations ... When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking."[11]

26. In the case of the territorial dispute between Burkina Faso and Mali, the Court concluded that such declarations can certainly have the effect of creating legal obligations for the State on whose behalf they are made, but only when it was the intention of the State making the declaration that it should become bound according to its terms.[12]

27. It should be made clear, moreover, that the act which the State formulates may be addressed to other subjects of international law, including international organizations. As stated earlier, a distinction should be drawn between the elaboration of the act, which is attributable to the State, and the legal relationship that might be created by means of such acts with other subjects of international law, including subjects other than States, which would depend on the effects of the acts in question.

28. The unilateral legal act which the State formulates can be addressed to another State, several States, the international community as a whole or any other subject of international law. The legal relationship between the State formulating the act and the addressee subject probably cannot exclude other subjects of international law, specifically, international organizations.

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of a negotiated and legally binding international instrument. The non-aligned countries members of the Group of 21 in the Conference on Disarmament continue to hold this view.

The question that arises is whether such declarations legally engage the States which make them even if they are subject to reservations and conditions that limit their scope and content, or, on the other hand, whether they are simply political positions that can only engage the international political responsibility of States in the event of non-compliance.

Stress should be laid on the need to distinguish between the legal force of such acts and their effectiveness, given the conditions that are incorporated into such declarations, a question that, regrettably, has not been addressed, much less defined in the Conference on Disarmament.

Such declarations, made publicly, with a specific purpose, addressed to a group of non-nuclear-weapon States and giving rise to expectations on their part, and probably prompting certain attitudes or types of conduct on their part, could be international legal engagements on the part of the declarant States. The ambiguity as to their nature is precisely one of the characteristics of such declarations that should be examined with great care. This further underscores the need to establish clear rules that may be able to regulate the operation of such international legal acts of States.

[11] *Nuclear Tests* case (Australia v. France), (Judgment of 20 December 1974), *I.C.J. Reports 1974*, p. 267, para. 43; and *Nuclear Tests* case (New Zealand v. France), (Judgment of 20 December 1974), *I.C.J. Reports 1974*, p. 472, para. 46.

[12] *Frontier Dispute* case, *I.C.J. Reports, 1986*, p. 573, para. 39.

29. Some representatives stated in the Sixth Committee in 1998 that they saw no reason to exclude from the scope of the study acts formulated in relation to other subjects of international law, especially considering that such acts might in practice be addressed both to States and to international organizations.[13]

30. If international organizations are to be considered at this stage within the scope of the study that the Commission has undertaken, it should be only in this context, that is, as already indicated, in relation to acts that might be addressed to them. For the time being, that question would not be of interest to the study being undertaken, since only the question of the formulation of such acts has been addressed up to now.

31. As delegations noted when the Vienna Convention on the Law of Treaties of 1969 was being drafted, acts of international organizations are complex. The fact that they were not included within the scope of application of the Convention did not mean that they did not exist, that they were not important in international practice, and that they did not have legal effects.

32. Consideration of legal acts elaborated by international organizations as part of the study of unilateral legal acts is a complex undertaking. It would encompass not only acts emanating from the organs of international organizations, which would require consideration of their competence and rules of decision-making, but also acts of officials charged with representing the organization in its international relations, an equally complex matter. While unilateral as to their form, such acts can be autonomous and can comprise autonomous obligations for the organization in its relations with States, other organizations or the international community as a whole.

33. Since an international organization, represented by its highest-ranking administrative officer, can in most cases conclude treaties with one or more States or with another international organization, it must be assumed that such an organization, represented by such an officer, can, in accordance with its internal rules, formulate unilateral legal acts which would no doubt be considered to belong to the category of acts that the Commission is now studying.

34. Another question that should be considered in due course in relation to acts formulated by an international organization is the difficulty posed by the lack of a legal regime common to international organizations, that is, a general constitutional law of international organizations. Admittedly, however, it can be recognized that there are certain common principles and that the law of the United Nations, or of certain international organizations, does exist. It must also be recognized that there are common special regimes, at least within the United Nations system, that are very important in practice, such as those relating to the international civil service or to the United Nations pension system.

35. The diversity of the rules, especially those relating to the functioning and competence of the various organs and the rules governing the adoption of their recommendations and decisions (resolutions), further complicates the question. There are terminological uncertainties and conceptual and logical ambiguities which render the world of such acts difficult to comprehend, identify and systematize.[14]

> "Les raisonnements conduits, à propos des actes étatiques, en s'appuyant sur le principe de la souveraineté, ne peuvent être purement et simplement transposés aux

[13] Statements by the representatives of Italy (A/C.6/53/SR.18, para. 31); Switzerland (A/C.6/53/SR.17, para. 40) and Portugal (A/C.6/53/SR.20, para. 31).

[14] Arbuet Vignalli, Jiménez de Aréchaga and Puceiro Ripoll, *Derecho Internacional Público*, vol. 1 (Montevideo, Fundación de la Cultura Universitaria, 1st ed., 1993), p. 276.

actes des organisations internationales: il faut prendre en compte la compétence limitée des organisations et le fait que ces actes atteignent les Etats tantôt en tant que membres de l'organisation (actes autonormateurs), tantôt en tant que sujets autonomes (actes hétéronormateurs); l'opposabilité des actes unilatéraux des organisations dépend d'un jeu d'éléments plus complexes que celle des actes unilatéraux étatiques."[15] (The arguments based on the principle of sovereignty that are put forth in relation to State acts cannot simply be transposed to acts of international organizations. It is necessary to take into account the limited competence of the organizations and the fact that such acts affect States both as members of the organization (autonormative acts) and as autonomous subjects (heteronormative acts). The opposability of unilateral acts of organizations depends on a more complex set of factors than does the opposability of unilateral acts of States.)

36. This does not, however, exclude the legal acts which a State formulates in the framework of international organizations and international conferences, such as, for example, unilateral declarations concerning negative security guarantees made in writing by certain States in the framework of the Conference on Disarmament.[16]

37. Whatever the case, the Commission should not, as some delegations stated in the Sixth Committee in 1998, rule out permanently the possibility of considering such acts in the future, although it is concentrating at present on the study of unilateral legal acts of States.

II. Definition of unilateral legal acts (declarations) of States

A. Draft article

38. The Special Rapporteur proposes the following article:

"Article 2

"Unilateral legal acts of States

"For the purposes of the present draft articles, 'unilateral legal act' means an unequivocal, autonomous expression of will, formulated publicly by one or more States in relation to one or more other States, the international community as a whole or an international organization, with the intention of acquiring international legal obligations."

B. Commentary

39. The Vienna Convention on the Law of Treaties of 1969 contains an article relating to the use of terms which is not a definition of the various terms used in the Convention, including "treaty".

40. As the term "unilateral acts of States" will be used throughout the draft, its meaning must be clear, hence a provision is needed to clarify it.

41. Regardless of whether or not it will be necessary to clarify other terms in a specific article like article 2 of the 1969 Convention, the draft articles on unilateral acts of States

[15] Patrick D'Ailler and Alain Pellet, *Droit international public* (Paris, LGDJ, 9th ed., 1999), p. 356.

[16] See *supra*, note 10.

should contain a specific provision that would clarify the meaning of the term "unilateral acts" without being an actual definition of it. By way of analogy, article 2 (1) (a) of the 1969 Convention, concerning the term "treaty", is not a definition either.

42. In the first report submitted on the topic, we attempted to separate the formal act from the material act and concluded that a declaration was a formal legal act that was more easily subject to the elaboration of specific rules governing its operation. We asserted, in fact, that the formal declaration was the means by which a State most often formulated unilateral acts, irrespective of their content and scope. It was stated at the time that in the context of the law of unilateral acts, the declaration was the instrument by which a State most often assumed international obligations, in the same way that in the context of international treaty law, the treaty was the most common instrument by which States made international legal engagements. Some representatives in the Sixth Committee in 1998 shared this view.[17]

43. Not all, however, endorsed this assertion. Some representatives pointed out that it was restrictive, and that to replace the term "unilateral act" by "unilateral declaration" could allow for the exclusion of specific acts. The observer for Switzerland, in particular, indicated in the Sixth Committee that a (unilateral) act usually took the form of a declaration, but perhaps not always. The expression "declaration" seemed to him unduly restrictive; he therefore preferred the term "act".[18] For his part, the representative of France indicated that it was necessary to avoid an overly broad or abstract definition of a unilateral act, and that it was unnecessary, on the other hand, to confine the topic within overly narrow limits.[19]

44. In our view, the definition of a unilateral act should revolve around a formal act, that is, a declaration, as a generic act distinct from the material act that the declaration may comprise. It is necessary to separate the *instrumentum* from the *negotium*, which may, for its part, be varied. This makes it somewhat difficult to establish common rules applicable to all possible types of *negotia*.

45. Nevertheless, in view of the differences of opinion which exist at present with regard to the acceptance of a formal act as a generic act, we will use the term "unilateral legal act" as a synonym for the expression "unilateral declaration". Admittedly, the assimilation of these two terms does not fully coincide with reality. It coincides, rather, with a question of a practical nature that may be superseded once it is determined whether in fact, in addition to declarations, there are other formal acts, and whether the rules that can be elaborated to govern their operation can take all those acts into consideration.

46. An autonomous unilateral legal act (declaration) or strictly unilateral act was defined in the first report as "an autonomous expression of clear and unequivocal will, explicitly and publicly issued by a State, for the purpose of creating a juridical relationship — in particular, to create international obligations — between itself and a third State which did not participate in its elaboration, without it being necessary for this third State to accept it or subsequently behave in such a way as to signify such acceptance."[20]

47. In the Sixth Committee there was support for the idea that a unilateral act is an autonomous (unequivocal) expression of will by a State which produces international legal

[17] Statements by the representatives of Bahrain (A/C.6/53/SR.21, para. 14), Austria (A/C.6/53/SR.15, para. 10) and Venezuela (A/C.6/53/SR.18, paras. 27–28).

[18] Statement by the observer for Switzerland, A/C.6/53/SR.17, para. 40.

[19] Statement by the representative of France, A/C.6/53/SR.16, para. 55.

[20] A/CN.4/486, para. 170.

effects.[21] Reference was made also to the autonomy of a unilateral act in the sense that it can produce legal effects under international law without it being necessary for one or more other States or subjects of international law to which it may be addressed to accept it or react to it in any other way.[22] We consider these observations to be very important for the elaboration of the definition of such acts.

48. In order to provide a basis for the drafting of this article, we deem it advisable to refer, however briefly, to what we consider to be the constituent elements of the definition of unilateral legal acts of States.

49. In the first report it was emphasized that the expression of will must be demonstrated unequivocally and publicly. The intention of the State which performs the act is fundamental to determining the nature of the act and the scope of the obligation which it intends to acquire by means of the act. This is consistent with several judgments of the International Court of Justice[23] and with the general opinion reflected in international doctrine.

50. It is essential that the State formulate the act (declaration) in the proper manner, that is, unequivocally and publicly. The terms "unequivocal" and "public" satisfy the need to limit unilateral acts to acts formulated with the intention of acquiring legal obligations and to prevent other acts from being attributed to the State. They are also consistent with the restrictive approach that must be maintained vis-à-vis the formulation and interpretation of legal acts of States. The Court, in relation to interpretation in particular, noted that "[w]hen States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for."[24]

51. The author of the act must express unequivocally the will to create a juridical norm comprising an obligation for the author and rights for other subjects.[25] That will must, moreover, be expressed freely, as the unvitiated normative will of the author, as we shall see below when the consent of the author State is considered.

52. The clear and very specific purpose of the declaration is fundamental to the determination of the declarant State's intention to make an engagement and acquire an obligation. It is necessary above all that the purpose of the unilateral engagement be sufficiently clear, as the Court indicated in its judgments in the *Nuclear Tests* cases.[26]

53. The lawfulness of the purpose is also essential in the identification of the unilateral State act with which we are concerned, a question that will be examined later when the conditions of validity of the act are examined.

54. The act must, moreover, be given sufficient publicity to enable it to produce effects. In that connection, we should recall that when the topic was considered in the Commission in 1998, it was indicated that, in accordance with at least one judicial decision, publicity was not a prerequisite in order for unilateral acts to be legally effective, and that a promise

[21] Statements by the representatives of France (A/C.6/53/SR.16, para. 56); Switzerland (A/C.6/53/SR.17, para. 38), Venezuela (A/C.6/53/SR.18, para. 27); Tunisia (A/C.6/53/SR.18, para. 59) and Germany (A/C.6/53/SR.18, para. 21).

[22] Statements by the representatives of Venezuela (A/C.6/53/SR.18, para. 27) and Tunisia (A/C.6/53/SR.18, para. 59).

[23] *Nuclear Tests* case (Australia v. France), (Judgment of 20 December 1974), *I.C.J. Reports 1974*, p. 267, para. 43; and *Nuclear Tests* case (New Zealand v. France), (Judgment of 20 December 1974), *I.C.J. Reports 1974*, p. 267, para. 44, and p. 472, para. 46.

[24] *I.C.J. Reports 1974*, p. 267, para. 44, and pp. 472–473, para. 47.

[25] Didier Sicault, *Du caractère obligatoire des engagements unilatéraux en droit international public*, vol. 4 (Paris, RGDIP, 1979), p. 665.

[26] *Nuclear Tests*, op. cit., p. 267, para. 43, and p. 269, para. 51.

could, for example, legally engage the State which formulated it even if it did so behind closed doors.[27] It was also stated that publicity was related to the proof of the act's existence and to the identification of its addressee. This question will, however, be addressed in further detail at a later stage.

55. In our view, however, publicity is a defining element of a unilateral act. In that connection, a unilateral act must be performed publicly, that is, the addressee State must be made aware of it, as the Court indicated in its 1974 decisions in the *Nuclear Tests* cases referred to earlier. In point of fact, a State act acquires its meaning and final form when it is made public, or at least when the addressee State or States are made aware of it. Otherwise, the act would be without legal force.

56. A declaration may, of course, be made *erga omnes*, meaning that it may not necessarily be addressed to any one State in particular, as can be seen in the Court's judgments in the above-mentioned *Nuclear Tests* cases.[28]

57. Whatever the case, a unilateral act must be formulated in relation to a specific addressee, be it one or more States or the international community as a whole, and not in a vacuum. The Court, in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, did not consider the declaration made by the Junta of National Reconstruction of Nicaragua to the Organization of American States (OAS) to be a legal engagement. It explained that it had to be very cautious when faced with a unilateral declaration having no specific addressee.[29]

58. It should be made clear, moreover, that a unilateral act (declaration) may be formulated by a State or by several States, as a single expression of will. It may be formulated by means of an individual, a collective or a joint act, in relation to one or more other subjects that have not participated in its elaboration; this is the basis of the view that the act in question is a heteronormative one.

59. This situation must also be differentiated from the one arising from the adoption of so-called collateral agreements, as referred to in articles 34 et seq. of the Vienna Convention of 1969, and to which the first report referred extensively.

60. In referring to the origin of the act, the definition uses the term "formulated", which is considered to be more appropriate than "elaborated", the term used more frequently in treaty law and in relation to joint acts.

61. The definition makes it clear that we are dealing with an autonomous expression of will that can comprise obligations only for the State or States formulating it, since a State cannot impose obligations on other States without their consent. This is consistent with an established principle of international law, namely, *pacta tertius nec nocent nec prosunt*.

62. Of course, the unilateral acts in question are autonomous or independent of pre-existing juridical norms, for, as noted in the first report on this topic, a State can adopt unilateral acts in the exercise of a power conferred on it by a pre-existing treaty or customary norm. This appears to be the case with regard to, *inter alia*, unilateral legal acts adopted in connection with the establishment of an exclusive economic zone. Such acts, while of domestic origin, produce international effects, specifically, obligations for third States which did not participate in their elaboration. Naturally, such acts go beyond the scope of strictly unilateral acts and fall within the realm of treaty relations.

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[27] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), para. 171.

[28] *I.C.J. Reports 1974*, p. 269, para. 50.

[29] Ibid., p. 132, para. 261.

63. The definition does not expressly mention the fact that such unilateral acts do not require either the acceptance of the addressee subject or any other conduct which may signify acceptance on the subject's part. It is therefore understood that such acts are characterized precisely by the lack of the need for such acceptance, despite its having been included in the previous definition. This obviates the need for an express clarification in the draft article on definition.

64. Lastly, with regard to the form in which consent is expressed by the State, we should note that it appears unnecessary to specify in the definition of the act (declaration) whether the acts or declarations in question are made in writing or orally, so long as it is understood that the form of expression has no bearing on the intention to make an engagement. The State or its agent can make an engagement by means of either a written or an oral declaration. In this connection, the International Court of Justice, in its 1974 decision in the *Nuclear Tests* cases referred to earlier, stated that

> "With regard to the question of form, it should be observed that this is not a domain in which international law imposes any spec al or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form. Thus the question of form is not decisive."[30]

III. Capacity to formulate unilateral legal acts

A. Draft article

65. The Special Rapporteur proposes the following article:

"Article 3

"Capacity of States

"Every State possesses capacity to formulate unilateral legal acts."

B. Commentary

66. The fundamental conditions that must be met for a legal act to be valid are the imputability of the act to a subject of law and the observance of the rules relating to the formation of will. It must be reiterated that while the procedure of elaborating the act is regulated by domestic law, the validity of its effects pertain to international law.

67. When the Vienna Convention on the Law of Treaties was in the drafting stage, the Commission discussed very carefully the draft article on capacity to conclude treaties, taking into account not only the report of the Special Rapporteur, but also the views of States. After a long debate, the discussion ended in the drafting of article 4 of the Convention. It simply restates the principle that all States have the capacity to conclude treaties, based, in turn, on the principle of the legal and sovereign equality of States.

68. In the case of the draft articles on unilateral acts, based on the discussion in the Commission, it was deemed advisable to submit an equally simple article that would merely

[30] *I.C.J. Reports 1974*, pp. 267–268, para. 45, and p. 473, para. 48.

reflect the capacity of States to formulate unilateral legal acts (declarations). That would avoid rehashing the debate held on the question at the time.

69. This provision, like article 6 of the Vienna Convention of 1969, must be limited to States. It should be recalled that originally, when the Vienna Convention was in the drafting stage, wording was proposed in the Commission that would include "other subjects of international law", as well as the question of the capacity of the entities within a federal State. At one point in the Commission's debate, it was even suggested that a provision on State capacity should be eliminated, as was done in the Vienna Convention on Diplomatic Relations of 1961, although that had not been raised at the Vienna Diplomatic Conference.

70. While it was unnecessary to include such an article in the Vienna Convention on Diplomatic Relations of 1961, it was deemed important to include it when the 1969 Convention was being drafted. It would now appear necessary to include a provision of this nature in the present draft articles. As Mr. El-Erian stated in the Commission in 1985,

> "Capacity to establish diplomatic relations had not been regulated in the draft articles on diplomatic relations because of the different context in which it had been raised; there had been a controversy as to whether the establishment of diplomatic relations was a right or an attribute of international personality."[31]

For his part, Sir Humphrey Waldock, Special Rapporteur on the topic of the law of treaties, noted in his first report that the question of capacity was much more important in the context of the law of treaties than in the context of diplomatic relations; it was therefore important and desirable to include a provision on that subject.[32]

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[31] *Yearbook ... 1965*, vol. I, 779th meeting, para. 54.

[32] *Yearbook ... 1962*, vol. I, 640th meeting, para. 2.